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No. 08-1185

In the Supreme Court of the United States

GENA MARIE DUNPHY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends (Pet. 7-26) that Court should grant certiorari to resolve the circuit conflict on the question whether the holding of *United States* v. *Booker*, 543 U.S. 220 (2005), which remedied the constitutional defect in the Sentencing Guidelines by rendering them advisory, applies in a sentence modification proceeding under 18 U.S.C. 3582(c). This Court has received several other petitions raising the same basic claim. As the government has explained in its brief in opposition to the first of those petitions, see *United States* v. *Rhodes*, No. 08-8318 (filed Mar. 27, 2009),[1] although the courts of appeals are divided on this issue, this Court's review of that issue is not currently warranted.

[1] We have served petitioner with a copy of the government's brief in opposition in *Rhodes*.

Six of the seven courts of appeals to consider the issue have held (correctly, in the government's view) that *Booker* does not apply in sentence modification proceedings under Section 3582(c). See U.S. Br. in Opp. at 15-16, *Rhodes* (No. 08-8318) (citing cases). Although the Ninth Circuit's decision in *United States* v. *Hicks*, 472 F.3d 1167 (2007), is inconsistent with these decisions, *Hicks* is the subject of a pending government appeal in *United States* v. *Fox*, No. 08-30445 (9th Cir. filed Nov. 21, 2008). On March 13, 2009, the government filed its opening brief in the Ninth Circuit in *Fox*, and on April 13, 2009, the government filed a petition for an initial en banc review urging the Ninth Circuit to overrule its decision in *Hicks*. If the court of appeals grants the government's petition and agrees that *Hicks* should be overruled, the current circuit conflict will disappear. If the court of appeals denies the government's petition (or grants the petition and reaffirms *Hicks*), the government would retain the option of seeking this Court's review at that time. The pendency of the proceedings in *Fox*, therefore, renders this Court's review of the issue premature.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ELENA KAGAN
Solicitor General

APRIL 2009

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[2] The government waives any further response to the petition unless this Court requests otherwise.